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Supreme Court of the United States

October Term, 1954

No. [redacted] 8

INDIAN TOWING COMPANY, INC., et al.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

BRIEF ON REHEARING IN BEHALF OF INDIAN TOWING COMPANY, INC., ET AL.

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SUPREME COURT OF THE UNITED STATES.

No. 213.

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON REHEARING IN BEHALF OF INDIAN TOWING COMPANY, INC., ET AL.

MAY IT PLEASE THE COURT:

There have been no decisions bearing directly on the issues here involved since the filing of the application for a re-hearing in this matter. This brief is being filed merely to set forth a consolidated presentation for the convenience of the Court of all previous petitions and briefs filed in this case in behalf of petitioners.

The INDIAN TOWING COMPANY, INC., the UPPER MISSISSIPPI TOWING CORPORATION, the MINNESOTA FARM BUREAU SERVICE COMPANY, and UNITED FIREMEN'S INSURANCE COMPANY peti-

tioned this Honorable Court for a writ of certiorari to review a final decree of the United States Court of Appeals for the Fifth Circuit, No. 14,747, in which the said Court of Appeals affirmed a decree of the United States District Court for the Eastern District of Louisiana. This per curiam decree was rendered by Hutcheson, Chief Judge, Holmes and Borah.

The opinion delivered by the Court below is reported in 211 Fed. Rep. 2d 886, and a copy of said opinion is annexed hereto, as Appendix "A".

The judgment of the lower court was rendered on April 22, 1954. The time of its entry is unknown to petitioners. A statement of the grounds on which the jurisdiction of this Court was invoked is as follows:

a. The per curiam decree was rendered solely on the basis that the matter before the Court had been decided by Your Honors, the Supreme Court of the United States, on the authority *Elizabeth H. Dalehite, Henry G. Dalehite, Jr., et al. vs. United States of America*, 73 Sup. 956, 346 U. S. 15.

b. Petitioners aver that the case presented to the United States District Court and to the United States Court of Appeals for the Fifth Circuit does not come under the authority of *Dalehite vs. United States (supra)*, and that the only recourse that petitioners had was an application for writ of certiorari to this Honorable Court.

c. Petitioners aver that both the Judge of the United States District Court and the Judges of the United States Court of Appeals decided the case

solely on the basis of the decision of this Honorable Court and on no other basis. Petitioners will show that the facts of the case at bar are entirely different from the facts of the *Dalehite* case, and that both courts were in error in deciding the case at bar solely upon the basis of Your Honors' decision.

d. Petitioners show that, if your Honors' decision in the *Dalehite* case is applicable to the case at bar, then Your Honors have completely rewritten the Federal Tort Claims Act, so as to make it inapplicable to any tort claims against the United States of America other than damages due to automobile accidents.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254.

The question presented for review is whether the United States is liable under the Federal Tort Claims Act, Section 1346(b), Title 28 U.S.C., for damage to cargo resulting when a tug towing a barge was grounded on an island due to the negligence of the Coast Guard.

THE FACTS.

This was a suit brought as a civil action under Section 1346(b), Title 28, of U.S.C.A. The action arises out of the grounding of the Tug "NAVAJO" which was towing a barge designated as AS-16 carrying 1204.25 tons of triple super phosphate. The grounding occurred on Chandeleur

Island on October 1, 1951. The petition alleges that the grounding was due solely to the failure of the light on Chandeleur Island. The facts can best be stated by quoting paragraphs 7 and 8 of the petition.

"VII. The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of 'aids to navigation', and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.

"VIII. The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7, and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain the light or to notify vessels that the said light was not functioning."

Suit was originally brought in the Southern District of Mississippi but was transferred to the Eastern District of Louisiana, New Orleans Division. A motion to dismiss was then filed on the basis that the United States of America, had not consented to be sued under the Tort Claims Act for the type of maritime tort set forth in the petition; that, in the alternative, the provisions of the Suits in Admiralty Act, 46 U.S.C.A. or the Public Vessels Act, 46 U.S.C.A. 787, were applicable. The motion was maintained and the petition was dismissed and appellant appealed.

The basis for Federal jurisdiction in the Court of the first instance is the Federal Tort Claims Act and particularly Section 1346(b), Title 28 U.S.C.

THE QUESTION PRESENTED FOR REVIEW.

Your Honors are presented with purely a question of law. Was such a claim set forth for relief as comes under the Federal Tort Claims Act? Do petitioners set forth such a claim for relief that the decision in the *Dalehite* case should, as a mere matter of mechanics, decide the case against petitioners.

THE ARGUMENT.

Petitioners aver that there are many cases in the lower courts which sustain petitioners' petition prior to the *Dalehite* case. They are:

Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

Somerset Seafood Company vs. United States, 193 Fed. 2d 613, decided by the U. S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court.

Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court, decided by Judge Chesnut.

Lacy vs. United States, 98 Fed. Supp. 219.

State of Maryland, for the use of Pumphrey vs. Manor Real Estate and Trust Co., 176 Fed. 2d 414.

Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792.

Hernandez vs. United States, 112 Fed. Supp. 369.

Moran vs. United States, 102 Fed. Supp. 275.

The judges' opinion in these cases sustaining petitioners' position are unanswerable.

Petitioners further aver that they are calling the Court's attention to these cases for the reason that they do not believe it was the intention of this Honorable Court to overrule these cases, and petitioners aver that these cases are still decisive of the case at bar, but petitioners now desire to show this Honorable Court that, instead of being authority for the decisions of the district court and the

Court of Appeals in dismissing petitioners' claim, they are authority for denying the motion to dismiss.

Petitioners aver that a reading of the majority opinion rendered by the Honorable Mr. Justice Reed shows that the *Dalehite* case was decided upon one ground and one ground only; that all of the allegations in the plaintiff's petition in that case were based upon a wrongful **DISCRETIONARY ADMINISTRATIVE** action. He says:

> "It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H.R. 6463 makes this specific.
>
> "The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

Petitioners further aver that if the majority opinion of this Honorable Court is analyzed, the whole basis of the decision is to the effect that all allegations of liability were based upon abuse of discretion. For instance, Section 3 of the opinion says:

> "That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed."

Again the Court says:

> "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

The Court further said:

> "The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific citations of negligence discussed above. They are classically within the exception. 'The power to adopt regulations or by-laws. . . for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen * * * are generally regarded as discretionary, because, in their nature, they are legislative.'"

Petitioners finally quote from the last paragraph of the opinion which we think is decisive in this case:

> "Petitioners rely on the word 'wrongful' though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, committee discussion indicates that it had a much narrower inspiration: 'trespasses' which might not be

considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43-44. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see e.g., the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. § 742-743, in regard to maintenance and cure. Street, Tort Liability of the State; the Federal Tort Claims Act and the Crown Proceedings Act, 47 Mich. L. Rev. 341, 350."

Petitioners aver that this was not the violation of a discretionary duty. The claim in this case specifically states a cause of action, because it alleges acts of negligence and omissions on the part of a specific Coast Guard officer.

It does not fall within the exception of a discretionary duty. If the Coast Guard, in its discretion, had not placed a light on Chandeleur Island and the cause of action were based upon the failure to use the proper discretion, a cause of action might not have been stated. When the Coast Guard placed the light, it used its discretion. It said to mariners—a light is necessary here, and you may depend upon it. The cause of action alleged is negligence in the maintenance and operation of the light by a subordinate officer. It is not based upon an indiscretion of the Coast Guard in deciding not to maintain the light because the Coast Guard immediately placed it in operation again. It is based solely upon an act of negligence on the part of a subordinate officer in the performance of his duties. It clearly does not come under the exception in

Sub-section (A) of Article 2680, Title 28, U.S.C.A., wherein it says:

> "* * are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty * * *."

If the Coast Guard, in its discretion, determined that a light should be established and kept burning, and the light went out because of the negligence of a subordinate officer, then it is liable. It is clearly the intention of Congress that the negligence of any employee of the Coast Guard engaged in a civil function is the basis of a claim against the Government. Subsection (J) excludes "any claim arising out of the combatant activities of the military naval force or the Coast Guard during time of war". This exclusion shows clearly, under every reasonable theory of interpretation, that it was the intention of Congress that the Coast Guard should be liable for the negligence of any employee engaged in a peace time activity.

Petitioners aver that Judge McLaughlin of the United States District Court of Hawaii, in the case of *Hernandez vs. United States, supra*, recognized this distinction. In this case the United States set up a road block at a point intersecting a roadway of Hickman Field, a United States military air field. The plaintiff was forced to run off the road to avoid hitting the road block. Suit was brought under the Federal Tort Claims Act, alleging negligence on the theory that there were not proper warning signals, sentries or guards or anything else to indicate danger or give notice to travelers or passers along the highway of

the road block. The judge said in answer to the argument, that the erection of the road block was a *discretionary function*.

> "Applying the reasoning of the Somerset Seafood Co., Dishman and Costley cases, this Court concludes that exception (a) of Section 2680 is not applicable in this case. It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead. The allegations in the complaint are sufficient to confer jurisdiction on this Court to adjudicate the claim.
>
> "The motion to dismiss is denied."

Petitioners contend that the following language of Judge Ridge in *Mid-Central Fish Co. vs. United States*, 112 Fed. Supp. 792, shows the correct distinction between the *Dalehite* case and the present case:

> "Although Congress has provided in Section 2674, Title 28, U. S. C. A. that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances,' it is not thereby meant that federal liability is conditioned upon private liability under identical factual circumstances. Governmental liability may be imposed under the Act, even though private liability could never arise under identical factual situations due to the fact that the tortious discharge of purely sovereign, as distinguished from proprietary, functions is involved. Cf. Federal Crop Ins. Corp. v. Merrill, 332

U. S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10. The distinction which is to be drawn between legal and factual circumstances existing between the Government and its agents and those existing between the Government and third parties, constitutes the very foundation for the principle that no distinction is to be drawn between sovereign and proprietary functions of Government for purposes of ascertaining governmental liability under the Federal Tort Claims Act. Somerset Seafood Co. v. United States, 4 Cir., 193 F. 2d 631; Cerri v. United States, D. C., 80 F. Supp. 831; also, 'Problems under the Federal Tort Claims Act.' by L. R. Yankwich, United States District Judge for the Southern District of California, 9 F. R. D. 143, 156, (and authorities cited therein)."

Petitioners further aver that this distinction has been recognized by the Court of Appeals for the State of New York and the Supreme Court for the State of Illinois, two courts which are recognized as being outstanding. These cases are: *Johnston vs. City of East Moline*, 405 Ill. 460, 91 N. E. 2nd 401 and *Foley vs. New York*, 294 N. Y. 275, 62 N. E. 2d, 69.

In the *Johnston* case the Court said:

"We do not agree with that statement of law when applied to the facts now before us. By article 7 of the Vehicle and Traffic Law the Legislature created the State Traffic Commission and prescribed its functions. By section 95-a of that article it is provided that 'The state traffic commission shall have the power and *it shall be its duty* to regulate the type, location, erection, *maintenance* and removal of all traffic control signals and signal lights on or

along any state highway maintained by the state, and *every such signal or light shall hereafter* be *maintained at the expense of the state.*' (Emphasis supplied.) The traffic control signal here involved was erected on Union Road, a 'state highway maintained by the state.' It also appears from unreversed findings by the Court of Claims—'That the maintenance of Union Road and the traffic lights on said road were taken over completely by the State of New York and maintained solely by the Department of Public Works Division of highway approximately four years prior to August 4, 1940, the date of the accident, herein'; that 'it was the duty of the members of the Police Force of the Town of Amherst while daily touring the road and passing this traffic light to look at it and see if it was working right, and if it was not, to report it to the State Highway Department.' If, as has been found by the Court of Claims and the Appellate Division, the State, at the time of the accident here involved, had failed properly to perform the statutory duty it had undertaken to maintain the lights in the traffic control signal on Union Road, we think such breach of duty is made actionable by the State's waiver of immunity from liability declared by section 8 of the Court of Claims Act: 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complied with the limitations of this article.'

"We have had occasion to say that 'By section 12-a (Now §8 of the Court of Claims Act) liability when proved by the rules of law applicable to individuals,

has been affirmatively assumed (by the State) and jurisdiction to determine whether such a liability has been proved is conferred upon the Court of Claims." (Jackson v. State of New York, 261 N.Y. 134, 138; see, also, Holmes v. County of Erie, 291 N.Y. 798; Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 353; Paige v. State of New York, 269 N.Y. 352, 356)." *Foley v. State of New York*, 294 N.Y. 279, 280, 62 N. E. 2d 69.

"There was no statute requiring appellant to construct and maintain automatic signal devices at the intersection in question. (Cahill Illinois Rev. Stat. 1927, chap. 95a, secs. 26 and 33; pars. 27 and 34; Ill. Rev. Stat. 1943, chap. 95½, sec. 30, par 127.) Its action in this connection was voluntary. It had the power to provide for them if in its discretion they were necessary, but it was not required to do so. There is no claim that appellant was negligent in the exercise of its discretion to provide such system, or in the original construction of it. Whether in those matters it was in the exercise of a governmental function or a corporate duty is not, therefore, before us. The question of what the city did or permitted at the intersection, in the matter of controlling or not controlling traffic after the northwest standard was removed, is before us, and whether or not its acts and omissions in that regard were in the exercise of a governmental function or a corporate duty must be decided.

"As early as *City of Chicago v. Powers*, 42 Ill. 169, the principle was recognized that where a municipality undertakes to protect a street or bridge by lights it is liable for negligence if it does it in an insufficient manner. In *City of Freeport v. Isbell*, 83 Ill. 440, the same principle is enunciated and the

Powers case is cited, the court saying with reference to it: 'In the case referred to, the city had lighted a certain bridge where the accident occurred, as well as the street; but the injury arose from the fact that the light furnished by the city was insufficient to afford proper protection.' In the *Isbell* case the city had omitted to light a portion of the street. It was held not liable but the court said: 'In this case, if the City of Freeport, under the power conferred by the charter, had, assumed to light the street where the accident occurred; but had exercised the power in a negligent manner, and had failed, in the exercise of the power, to furnish lights sufficient to afford proper security from danger, a different rule would prevail, and the rule announced in the case cited (Powers case) would govern.'

"A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner. *Johnston v. City of Chicago*, 258 Ill. 494; *City of Chicago v. Seben*, 165 Ill. 371; 4 Dillon on Mun. Corp. (5th ed.) sec. 1741.

"A rule determining when a municipality is exercising a public or governmental function as distinguished from a strictly corporate duty is difficult to formulate. It has been said more than once that all that can be done with safety is to determine each case as it arises. See *Johnston v. City of Chicago*, 258 Ill. 494, 497, wherein is cited *Lloyd v. New York*, 5 N.Y. 369, and *Cobb v. Dalton*, 53 Ga. 426. In the *Johnston* case the city was held liable for negligence of a driver of an automobile hired by the library

board which was part of the city government and who at the time of the accident was conveying books from one library building to another along the streets of Chicago. On page 497 of that opinion, the court, speaking through Mr. Justice Carter, said: 'It is frequently stated that to determine whether there is municipal responsibility the inquiry must be whether the particular agents or servants for whose acts of negligence it is sought to hold the corporation are its agents and servants for the performance of a public duty imposed by law, or merely for the carrying out of private functions which are for its special benefit or advantage, (Citations).' In the same case it was said that the mere fact that a particular work may incidentally benefit the public does not necessarily exempt the city from liability for torts committed by its employees." *Johnston v. City of East Moline*, 405 Ill. 465-466.

It is most respectfully submitted that the dissent of Chief Justice Massey of the Court of Civil Appeals of the State of Texas, in the case of *Parson vs. Texas City*, 259 S.W. 2d 333, expresses the modern philosophy as to the liability of a sovereign. It expresses the reasons why Congress enacted the Federal Tort Claims Act as law. He said:

"The question is one not heretofore passed upon in Texas, and the writer, cognizant of the fact that the modern tendency is to restrict rather than to extend the doctrine of municipal immunity, and subscribing to the principles thereof, believes that correct application of principles of law requires the extension of the corporate obligations of a municipality to this and future situations similarly arising. . . And this I

> especially believe should apply when by law of the state a traveler upon city streets is directed by such city's defective mechanical traffic signals into a position of great danger, when the city has had time, after notice of the defect, to correct the condition of hazard thereby created."

Justice Massey, in his dissent, quoted the case of *City of Galveston vs. Posnainsky*, 62 Texas 118, which was decided back in 1884, wherein the following charge to the jury was given:

> "The opening and repairing of streets is a matter of discretion in the city government; but when she undertakes to open or construct streets and travel ways, she must so construct them as to render their use reasonably safe to such persons as are naturally expected to use said ways, using such care as such persons ordinarily exercise."

After the argument of the case three very important cases were called to the attention of the Court by petitioners in their reply brief.

The first was *Bevilacqua vs. United States, Yentsch v. United States*, 122 F. Supp. 493, where the facts were as follows: The Federal Government erected a series of navigation locks along the Allegheny River. These locks were operated by the Corps of Engineers of the United States Army. Lock No. 8 was one of a series of locks erected by the Government in accordance with a uniform system in effect at all the locks. Certain electric lights were maintained to warn navigators on the river of the peril to navigation created by the dam. The power generating equip-

ment for the lights did not function during the hours between 11 P.M. and 7 A.M., and, therefore, during those hours navigators were warned of the peril to navigation by kerosene lanterns. It was the duty of some employee of the Government to light these lanterns each night at 11 P.M. At approximately 12:05 A.M. of July 15, 1951, Yentsch and Bevilacqua, libellants intestates, went over the dam at Lock No. 8 and met their death. Judge Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, found that, as a matter of fact, the kerosene lanterns at Lock No. 8 were not lit on the night in question, and that the failure to light them was the proximate cause of the death of Yentsch and Bevilacqua. Judge Gourley further stated:

> "It is neither necessary nor appropriate to inquire into whether the chief administrative officer of the Corps of Engineers might have decided, in an exercise of discretion that the locks should be left in darkness when unattended. It is enough that superior officers have promulgated an unqualified rule to the effect that the lock should not be left in darkness. It is clear that the negligence herein charged was in no manner associated with an exercise of discretion. U. S. v. Hull, 1 Cir., 195 F.2d 64; Jackson v. U. S., 3 Cir., 196 F.2d 725; Costley v. U. S., 5 Cir., 181 F.2d 723."

The *Bevilacqua* case is exactly parallel with the one at hand. The lanterns were placed on the river as an aid to navigation, just as the lighthouse in our case was placed near Chandeleur Island as an aid to navigation. The decision to place the lights in both instances had been made before any damage was done, and the

subordinate charged with the duty of lighting and maintaining the lights, in each case, was without discretion—he simply had a duty to perform.

The second case called to the attention of the Court was *Pennsylvania R.R. Co. v. United States, et al.; A. & M. Trading Corp., et al. vs. United States; Rinn vs. United States; Geary v. United States, et al.*, and related cases, 124 F. Supp. 52. The *Pennsylvania Railroad Company* case is very similar to the case of *Dalehite vs. United States*, except that in the *Pennsylvania* case after the Coast Guard had used discretion in deciding that certain lighters could be loaded with high explosives, there were individual acts of negligence pleaded on the part of the Coast Guard Officer who was in charge of the operation. As a matter of fact, there were serious charges of negligence made against the Captain of the Port and his Chief Engineer as individuals after the decision to allow the loading had been made. The Court held that insofar as allowing the loading was concerned, this was an act of discretion, but as soon as it had been decided to allow the lighters to be loaded, the discretion ended, and that acts of negligence in loading made the United States liable under the Federal Tort Claims Act.

We also wish to call Your Honors' attention to the decision of *Eastern Air Lines, Inc. vs. Union Trust Company, et al.*, Nos. 11,991 and 11,992, and *United States of America vs. Union Trust Company, et al.*, Nos. 12,017 and 12,018, 221 F.2d 562, United States Court of Appeals for the District of Columbia Circuit, decided February 8, 1955. The statements of the Court to which we wish to call your particular attention are:

"The holding of the *Costley, Somerset* and *Gray* cases was neither overruled nor impaired by the later decision of the Supreme Court in *Dalehite vs. United States*, 346 U.S. 15 (1953)."

. . . . . .

"The Government says the *Somerset Seafood Company* case was overruled by the *Dalehite* opinion. We think not; our analysis of that opinion convinces us to the contrary."

. . . . . .

"We may fairly infer from the statement just quoted that the United States is liable for the negligence of its employees at the operational level, where there is no 'room for policy judgment and decision'. This leads us to the Government's argument that the negligence charged against the tower operators is the same as that charged against the Coast Guard in the *Dalehite* case, which the Supreme Court held was not actionable because of the discretionary exception. We quote in the margin the Supreme Court's disposition of the alleged negligence of the Coast Guard.

"The Court made it clear that, as far as the alleged official dereliction of duty in failing to police the shipboard loading was concerned, the decision not to do so had been made at a policy-forming level and was not the decision of the individual members of the Coast Guard whose duty it would have been to do the policing had they been instructed to do it. The Court said:

"'. . . To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to im-

pose a quarantine for, let us say, an outbreak of foot-and-mouth disease.'

"We may paraphrase the quoted sentence thus:

" 'To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for the failure of the CAA to take over for maintenance and operation a certain air traffic control tower.'

"Had the Coast Guard authorities decided to supervise the storage, we have no doubt the United States would have been liable in tort for any causal negligence of its personnel acting at the operational level. So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

* * * * * * * * *

"The three negligent omissions and the one affirmative negligent act found by the court were not 'decisions responsibly made at a planning level' and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary functions contemplated by § 2680(a) and clearly described in the *Dalehite* decision."

Additionally, your Honors' attention was directed to *Martin vs. Board of Fire Commissioners for the City of New Orleans*, 132 La. 187, 61 So. 197 and *Barnes vs. District of Columbia*, 91 U. S. 440, 23 L. Ed. 440.

A decree was entered on Monday, April 11, 1952, under which the Court, by an equal division of the honorable members, affirmed the decision of the lower court. As a result of that judgment petitioners applied for a re-hearing, which application was granted. In that petition the courts attention was specifically called to the case of *U. S. vs. Lawter*, 219 Fed. 2nd 559.

It is submitted that the Fifth Circuit Court of Appeals in the *Lawter* case completely disavowed the *Indian Towing Company, et al. vs. United States* decision. The Court distinguishes the *Lawter* case from the *Indian Towing Company* case by saying this:

> "Whatever then might be said of the liability of the United States, if the case had to do *with mere negligent omission or inaction of the Coast Guard, as was the case in Indian Towing Co. U. S. 5 Cir. 211 F (2) 886, is not controlling here* * *". (Emphasis supplied.)

The *Lawter* case was an action against the Federal Government for negligence on the part of the U. S. Coast Guard in attempting a rescue by helicopter of four people whose boat capsized in Biscayne Bay, Florida and was decided in favor of the plaintiffs and against the United States.

We have but to call the Court's attention to the precise wording of the Statute (28 U.S.C. Sec. 1346 (b)) to see that the Congress intended no differentiation between affirmative and passive negligence:

> "* * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the

> United States * * * for injury or loss of property * * * caused by the negligent or wrongful act *or omission* of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act *or omission* occurred." (Emphasis supplied.)

While the archaic doctrine of governmental immunity had always been complicated with distinctions between active and inactive negligence (most of which could never be rationalized), one of the clear cut areas of liability imposed by the Federal Tort Claims Act was the *"omission to act"* as well as the *active* perpetration of a tort. The two cases are indistinguishable.

As we said at the outset of this consolidated presentation, there have been no new cases bearing directly on the case at bar, but we would like to quote the following excerpt from the opinion of this Honorable Court in the *National City Bank of New York vs. Republic of China, et al.*, 75 S. Ct. 423.

> "But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as 'Public opinion as to the peculiar rights and preferences due to the sovereign has

changed', Davis v. Pringle, 268 U.S. 315, 318, 45 S. Ct. 549, 550, 69 L. Ed. 974; 'There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past * * *,' White v. Mechanics' Securities Corp., 269 U. S. 283, 301, 46 S. Ct. 116, 118, 70 L. Ed. 275; '* * * the present climate of opinion * * * has brought governmental immunity from suit into disfavor * * *,' Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 391, 59 S. Ct. 516, 519, 83 L. Ed. 784. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797. At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due him from the sovereign. And because of the objections to *ad hoc* legislative allowance of private claims, Congress a hundred years ago created the Court of Claims, where the United States, like any other obligor, may affirmatively be held to its undertakings. This amenability to suit has become a commonplace in regard to the various agencies which carry out 'the enlarged scope of government in ecomonic affairs', Keifer & Keifer v. Reconstruction Finance Corp., supra, 306 U. S. at page 390, 59 S. Ct. at page 519. The substantive sweep of amenability to judicial process has likewise grown apace."

WHEREFORE, it is respectfully submitted that the decision of this Honorable Court affirming the Court of Appeal for the Fifth Circuit is incorrect, and that it should, therefore, be reversed and this matter should be remanded for further hearing; that the order of the United States District Court for the Eastern District of Louisiana, New

Orleans Division, in the cause entitled "*Indian Towing Company, et al. vs. United States of America,*" No. 3667 on the Civil Docket of that Court be recalled and that the case be ordered tried with instructions as to the rights of petitioners under the Federal Tort Claims Act and particularly 1346(b), Title 28, U.S.C.

Respectfully submitted,

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New Orleans, Louisiana,
Attorney for Petitioners.

I certify that a copy of the foregoing brief has been served on the solicitor general and on Paul A. Sweeney, Attorney, Department of Justice, by depositing same in a U. S. mail box with air mail postage prepaid this date.

September ..., 1955.

RICHARD B. MONTGOMERY, JR.

APPENDIX "A".

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo", as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U.S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the *Dalehite* case while appellee as vigorously insists that that decision and the decision in the *Feres* case[1] are controling here.

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[1] Feres v. United States, 340 U.S. 135.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.

AFFIRMED.

A True copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX "B"

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * * * * *

APPENDIX "C".

Section 1346(b)—Title 28 U.S.C.

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."